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No. 04-14

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AIR LIQUIDE AMERICA L.P., *et al.*,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS and
PORT OF HOUSTON AUTHORITY OF
HARRIS COUNTY, TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF

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LIST OF PARTIES TO THE PROCEEDING BELOW AND DISCLOSURE STATEMENT FOR CORPORATE PETITIONERS

This information is set forth at page ii of the Petition for Writ of Certiorari, and there are no amendments to that Statement.

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REASONS FOR GRANTING THE PETITION

Owners' arguments go largely unaddressed in the Port's brief because the Port directs most of its effort toward redefining the main issue.

The main issue is whether the expansion of the constitutional navigational servitude accomplished by the Corps and the Fifth Circuit in this case is inappropriate and unwarranted. Owners contend that the power to secure removal of obstructions at no cost to the federal government does not – and should not – encompass authority to reallocate entirely non-federal expenses among non-federal parties.

The Port prefers to ask and answer a different question, framed as whether WRDA-86 waived the navigational servitude. *See* Br. in Opposition at i, 1, 9, 17, 20-21. The Port's steadfast refusal to acknowledge and address the real issue presented in the petition signals the absence of a ready answer.

I. The Issue Is The Servitude's Scope, Not Whether The Servitude Has Been Waived

At the same time it seeks to recast the issue, the Port also seeks to redefine the navigational servitude's scope. The Port wants to emphasize the federal government's authority to remove obstructions without acknowledging that this authority has limits.

"The navigational servitude defines the boundaries within which the government may supersede private

ownership interests to improve navigation." *Alameda Gateway, Ltd. v. United States*, 45 Fed. Cl. 757, 763 (1999) (citing *Owen v. United States*, 851 F.2d 1408, 1409 (Fed. Cir. 1988)). The servitude and the power that accompanies it are founded on Congress' constitutional authority "to regulate Commerce." *See* U.S. CONST. ART. I, § 8, cl. 3. This power, in turn, has been delegated to the Corps under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401. Among other things, this power authorizes the federal government to order removal of navigational obstructions. *Gibson v. United States*, 166 U.S. 269, 271-72 (1897); *see also United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62-63 (1913). Although broad, the navigational servitude's reach is not limitless and it is not coextensive with the Commerce Clause. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 172-73 (1979) ("While [a body of water] may be subject to regulation by the Corps of Engineers, acting under the authority delegated to it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the [regulated waterway] is also subject to a public right of access"); *see also Alameda Gateway, Ltd.*, 45 Fed. Cl. at 764.

The navigational servitude is "applied through the § 10 permits" issued to Owners by the Corps pursuant to 33 U.S.C. § 403 allowing construction of pipelines beneath the Houston Ship Channel. Pet. App. at 4a, 9a. "These § 10 permits provide . . . that pipelines and other structures beneath navigable waters are to be relocated ***at no expense to the United States*** if required by federal navigation interests or projects." *Id.* at 4a (emphasis added); *see also United Texas Transmission Co. v. United States Army Corps of Eng'rs*, 7 F.3d 436, 439 (5th Cir. 1993) ("*UTTCO*") (quoting from

provision of § 10 permit requiring owner to "remove or alter the . . . obstructions caused thereby ***without expense to the United States***") (emphasis added).

Under the Water Resources Development Act of 1986 ("WRDA-86"), Congress decreed that the United States would not bear responsibility for utility relocation costs. *See* 33 U.S.C. § 2211(a)(4) (local sponsor, rather than the United States, must "perform or assure the performance of all relocations of utilities necessary to carry out the project"). It follows that the relocation costs at issue are entirely non-federal under the circumstances of this case. The Fifth Circuit's judgment is erroneous because it expands the navigational servitude and bestows upon the Corps power to decide payment issues between non-federal parties when (1) the costs at issue are entirely and exclusively non-federal, and (2) the Owners have voluntarily performed the relocations to avoid delaying the project or creating extra costs. The Corps has never before had or claimed this power. Under WRDA-86 and the circumstances of this case, the Corps has nothing to say about allocating these non-federal costs.

The Port sidesteps this fundamental problem by redefining the issue as waiver of the navigational servitude. The Port variously asks whether Congress in WRDA-86 "implicitly waived" the navigational servitude (Br. in Opposition at 1, 9), "*restrict*[ed] the servitude" (*id.* at 9) (original emphasis), "'necessarily' decided to waive the servitude" (*id.* at 14), "waived the navigation[al] servitude" (*id.* at 17), "intended to waive the navigation[al] servitude" (*id.* at 20), "restrict[ed] the application of the servitude" (*id.*),

or "intended to withdraw the authority of the Corps to enforce its permits." *Id.* at 21. *See also id.* at i (rewriting issue presented to ask whether navigational servitude was "withdrawn" by WRDA-86).

In keeping with this theme, the Port also rewrites the Section 10 permits themselves by repeatedly omitting reference to removal of obstructions at "no expense to the United States." *See* Br. in Opposition at 9, 12, 20 n.7. The Port's preferred phraseology is to describe Section 10 authority as the power to require removal of "permitted facilities at [permittees'] . . . expense." *Id.* at 12. This is an incomplete description of the servitude and the permit. This sleight-of-hand does not work because power to compel removal of obstructions "at no expense to the United States" is ***not*** equivalent to power to compel removal at Owners' expense when, as here, the governing statute specifies that a non-federal entity must accomplish any such removals.

By allowing the Port and the Corps to use their "partnership" (12R3069) to reallocate non-federal expenses among non-federal entities, the Fifth Circuit effectively expands the navigational servitude's scope. That is the constitutional issue.

In restricting costs in WRDA-86, Congress did not "restrict" the navigational servitude. Rather, Congress made the navigational servitude a non-issue. No explicit or implicit waiver of the navigational servitude is necessary because the navigational servitude simply is not implicated when (1) the only relocation costs involved will be borne by entities other than the United States, and (2) the relocation has been undertaken timely so as not to interfere with the Corps' plans.

It is no answer for the Port to argue that WRDA-86 does not contain language waiving the navigational servitude. Waiver of the servitude is not the inquiry, and the Port's discussion of whether the servitude has been "waived" or "restricted" or "withdrawn" is not germane under the circumstances of this case.

The Port comes close to acknowledging the real issue in this case in footnote 7 of its brief, but this meager response falls short. A sweeping generalization that "imposition of the servitude virtually always implicates 'non-federal costs'" does not address the essential problem here because the costs in this case are by statute exclusively and entirely non-federal. From there, the Port veers off again and argues that a "waiver" is required if "WRDA-86 restricts the application of the servitude." *Id.* This is merely another effort to redefine the issue. As explained above, WRDA-86 does not "restrict" the navigational servitude. WRDA-86 restricts the costs at issue in such way as to make them entirely non-federal, and thereby renders the navigational servitude immaterial because invocation is not necessary to (1) avoid federal expense, or (2) compel relocation of utilities left in place by a recalcitrant private owner so as to avoid disruption of a Corps project.

Also unavailing is the Port's belated effort to manufacture federal costs arising from the utility relocations at issue. *See* Br. in Opposition at 21 & n.8. The Port speculates about the potential for "some tens of millions in additional costs to the federal government" but fails to proffer any record cite to support this assertion. Presumably, if "tens of millions in additional costs" existed and were capable of estimation, the Port would have provided such numbers to the trial court

and would be able to provide record cites for this Court. Utter speculation of this nature fails to establish that the costs at issue in this case are anything other than entirely non-federal.

The Port cannot camouflage the gaps in the Fifth Circuit's judgment by pointing to the decision in *UTTCO*. As the Port acknowledges, *UTTCO* addressed neither WRDA-86 nor a congressional mandate for the local sponsor to "perform or assure the performance of" utility relocations. *See UTTCO*, 7 F.3d at 438-40. *UTTCO* addressed the Corps' right to take action against an owner who refused to relocate, which meant that "the flood control project was delayed by UTTCO's unflagging refusal to relocate its pipelines. . . ." *Id.* at 439. No such issue is presented in this case. As the Fifth Circuit suggested should have been done in *UTTCO*, the Owners acted appropriately in this case by relocating first and then pursuing legal remedies for reimbursement. *See id.* at 447.

The Port's reliance on *United States v. Alameda Gateway Ltd.*, 953 F. Supp. 1106 (N.D. Cal. 1996), fails for the same reason. That case too focused on the Corps' authority to seek relief against a recalcitrant property owner who refused to relocate impediments to navigation. *See id.* at 1110. Moreover, the Port cannot properly analogize the language in 33 U.S.C. § 2211(a)(4) to the Project Cooperation Agreement discussed in *Alameda Gateway*. The contract-based contentions of the property owner in *Alameda Gateway* were rejected because the property owner lacked standing to enforce any contractual obligations between the Corps and the City of Oakland, and because the general contract language did not specifically address the piers at issue in that dispute. 953 F. Supp. at 1113-14.

Contractual considerations such as those discussed above obviously do not apply in the context of addressing the scope and effect of 33 U.S.C. § 2211(a)(4). Therefore, both *UTTCO* and *Alameda Gateway* are inapposite to the extent they discussed cooperation agreements between the Corps and local governments against the backdrop of a recalcitrant property owner's refusals to cooperate resulting in project delay. *See UTTCO*, 7 F.3d at 439 & n.3; *Alameda Gateway Ltd.*, 953 F. Supp. at 1113-14.

II. Neither WRDA-86's Terms Nor Its Legislative History Help The Port

The Port's effort to inject ambiguity into 33 U.S.C. § 2211(a)(4) is unavailing. *See* Br. in Opposition at 13. The statute need not expressly reference "costs" in order to make clear that no federal costs are involved. When the statute directs that "[t]he non-federal interests . . . shall perform or assure the performance of all relocations of utilities necessary to carry out the project . . . ," the statute takes the Project beyond the realm of federal costs. Congress did not say who had to pay; instead Congress confined itself to saying who did ***not*** have to pay – the United States. By expressly and unambiguously stating that the United States is not responsible for utility relocations, WRDA-86 makes clear that the decision as to who must pay for such relocations will be determined by a mechanism outside of the navigational servitude.

The Port also fails in its effort to argue that reference to legislative history always is foreclosed in the absence of statutory ambiguity. *See* Br. in Opposition at 14. This

contention is, at best, overstated. *See, e.g., United States v. Romani*, 523 U.S. 517, 533-34 (1998); *Conroy v. Aniskoff*, 507 U.S. 511, 514-18 (1993). To the extent that the Port wishes to rely upon Senate Report No 99-126 despite its disdain for legislative history, that reliance is misplaced. *See* Br. in Opposition at 16. This report predated the conference report by at least a year, and it addressed a Senate bill that ultimately was abandoned in favor of an amended House bill. *See* S. REP. NO. 99-126.

III. This Case Does Not Present Alternative State-Law Grounds For Affirmance

The Port's effort to identify alternative state-law grounds for affirmance founders on the Fifth Circuit's repeated and emphatic statements relying exclusively upon the navigational servitude to decide the case. *See* Pet. App. at 4a (Texas law does *not* control) (original emphasis); *see also id.* at 9a ("In any event TEX. WATER CODE § 60.102 does *not* apply. First, to trigger that section's application the Port had to 'require' the relocation. It did not (and cannot) do so") (original emphasis); *id.* ("This provision is not applicable because the Port did not *require* the relocation – the Corps did") (original emphasis); *id.* at 10a ("By requiring removal of an obstacle to a navigable waterway, the Corps was acting pursuant to power delegated to it by Congress. It was pursuant to this power, not the Port's request, that the Corps required the relocation"); *id.* at 11a ("the Corps not the Port, required Owners to relocate their pipeline").

In light of these statements, the Port cannot credibly argue that application of Section 60.102 "was an alternative

ground for the Fifth Circuit's judgment." *See* Br. in Opposition at 22. The Fifth Circuit says otherwise.

IV. The Port Fails To Address Or Join Issue On *Solid Waste Agency*

The Port neither discusses nor cites this Court's decision in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). This omission is telling because it suggests that the Port has no response to two main points apparent in *Solid Waste Agency*: (1) without regard to the existence or absence of a circuit split, certiorari is warranted when the Corps pushes the outer limits of constitutional and congressionally granted authority; and (2) courts should be "loathe to replace the plain text and original understanding of a statute" with an amended and inconsistent agency interpretation. *See id.* at 168-70 & n.5, 172-73.

Here, the Fifth Circuit's judgment defers to the Corps' invocation of its navigational servitude when only non-federal costs are at issue, and it does so in the face of a prior inconsistent Corps interpretation of that same power. *See* Pet. for Writ of Certiorari at 6-7, 14, 25-26. As in *Solid Waste Agency*, intervention by the Supreme Court is warranted here.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted. The judgment of the court of appeals should be reversed, and this matter should be remanded to the court of appeals for further consideration.

Respectfully submitted,

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